Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2067

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN AND WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA, THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

Petitioners,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 29, 1980, in this case.[1]

QUESTIONS PRESENTED

1. (a) Did the Court of Appeals, Judge Tone dissenting, correctly conclude that the 1969 Indiana General Assembly in reorganizing the splintered and overlapping units of civil government in Indianapolis and Marion County had an affirmative Fourteenth Amendment duty, as defined in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), to black students attending the Indianapolis Public School district to remedy *de facto* racial differences between that school district and the other school districts in Marion County, even though all Indiana school corporations are organized and operated as separate governmental entities independent of both local civil government and each other and the legislation effected no school boundary change?

(b) In determining that the General Assembly acted with a discriminatory racial purpose in adopting its 1969 legislation, did the Court of Appeals, Judge Tone dissenting, fail to follow *Washington* v. *Davis*, 426 U. S. 229 (1976) and *Village of*

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1. Parties to the proceeding in the United States Court of Appeals not listed in the caption are: The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; School City of Beech Grove, Marion County, Indiana; School Town of Speedway, Marion County, Indiana; The Housing Authority of the City of Indianapolis, Indiana; The Metropolitan Development Commission of Marion County, Indiana; Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, a public corporate body; and The Indiana State Teachers Association.

Arlington Heights v. *Metropolitan Development Corporation,* 429 U. S. 252 (1977), by finding a purported change in a legislative policy requiring coterminous Indianapolis school and civil boundaries, even though that policy was substantially abandoned or limited by 1959 and 1961 legislation mandating establishment of school boundaries on considerations of financial and administrative efficiency, and Marion County school boundaries were established on that basis since 1961 and by 1969 were no longer coterminous with civil boundaries?

2. (a) Is the Court of Appeals majority opinion, Judge Tone dissenting, correct in determining that a purported Fourteenth Amendment violation by the Housing Authority of the City of Indianapolis—*i.e.*, placing its units of public housing within the more demographically black Indianapolis than in the surrounding suburban areas in Marion County—must be cured by transferring students across school district lines rather than by an affirmative housing remedy against HACI?

(b) Does it make any difference in establishing discriminatory intent or a significant interdistrict segregative effect in the location of public housing that it was located in both black and white demographic areas and did not increase the number of black students in the Indianapolis public school district, or under *Personnel Administrator of Massachusetts* v. *Feeney,* ..... U. S. ....., 60 L. Ed. 870, 888 n. 25 (1979) and *James* v. *Valtierra,* 402 U S. 137 (1971), that the Housing Authority had no ability under Federal law to locate public housing in the other districts because Marion County civil government officials with jurisdiction over the suburban areas outside Indianapolis were unwilling or unable to enter into the cooperation agreements necessary to Federal financing?

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OPINIONS BELOW

The opinions below on which this appeal is based are in chronological order, as follows:

Opinion of the United States District Court for the Southern District of Indiana ("District Court"), dated August 1, 1975. (419 F. Supp. 180; SA 36)[2]

Majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals"), dated July 16, 1976, affirming the District Court, which were appealed to this Court or subject to petitions for certiorari and were remanded by this Court, 429 U. S. 1068 (1977). (541 F. 2d 1211; SA 1)

Principal, concurring and dissenting opinions of the Court of Appeals, dated February 14, 1978, remanding the case to the District Court. (573 F. 2d 400; JA 54-83)

Opinion of the District Court on remand, dated July 11, 1978 (456 F. Supp. 183; JA 84-100).

Opinion of the District Court on additional limited remand related to remedy, dated April 24, 1979, as yet unreported. (JA 101-129)

Majority and dissenting opinions of the Court of Appeals, dated April 29, 1980, as yet unreported, which are the subject of this appeal. (JA 1-53)

JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed by this petition were dated and entered April 29, 1980. No petition for rehearing was filed. The jurisdiction of this Court in invoked under 28 U. S. C. § 1254(1).

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2. Petitioners hereby adopt the separately bound Joint Appendix, previously filed in this Court with petitions for certiorari to the United States Court of Appeals for the Seventh Circuit from the same judgment entered April 29, 1980, by The Metropolitan School District of Perry Township, Marion County, Indiana, and Otis R. Bowen, Governor of Indiana, and other State officials. A separately bound Supplemental Appendix is filed with this petition. These appendices will be cited as "JA" and "SA", respectively.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes of the State of Indiana involved in the Court of Appeals holding that the failure to expand the boundaries of the Indianapolis Public Schools in 1969 was a constitutional violation warranting an interdistrict school desegregation remedy are: Acts 1961, Ch. 186 (JA 138-151), Marion County School Annexation Act, Acts 1969, Ch. 52, School Annexation Amendment (JA 151-153), and Acts 1969, Ch. 173, Marion County Civil Government Reorganization Act often referred to as "Uni-Gov" (JA 154-167).

The statutes involved in showing the existing legislative policy as respects school and civil boundaries are: Acts 1959, Ch. 202, School Corporation Reorganization Act, (SA 63), Acts 1961, Ch. 186, Marion County School Annexation Act, *supra.* The statutes involved indicating the impediments to civil boundary change prior to and after 1969 are: Acts 1905, Ch. 129, as amended by Acts 1955, Ch. 269 (SA 55), and Acts 1969, Ch. 239 (SA 47).

The statutes involved in the Court of Appeals holding that the locating of all public housing projects within the area served by the Indianapolis Public Schools was a constitutional violation warranting an interdistrict school desegregation remedy are: Indiana Acts 1937, Ch. 207, pp. 1034-1055 (Housing Authority Act), as amended by Indiana Acts 1965, Ch. 384, pp. 1185-

1192 (JA 168); Indiana Acts 1937, Ch. 209, pp. 1058-1063 (Housing Cooperation Act) (JA 168-169); and the United States Housing Act of 1937, as amended, 42 U. S. C. § 1415 (JA 169-170).

The statutes cited above are set out in pertinent part in the Joint Appendix or the Supplemental Appendix at the pages indicated.[3]

STATEMENT OF THE CASE

First Two Hearings

The United States commenced this action in the United States District Court for the Southern District of Indiana, in May, 1968, under §§ 407(a) and (b) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000c-6(a) and (b), against The Board of School Commissioners of the City of Indianapolis, Indiana (IPS), an independent governmental entity as the only defendant. The "sole issue" was racial segregation within the IPS schools, and after hearing, the District Court entered an order in 1971, finding that IPS was ". . . operating a segregated school system wherein segregation was imposed and enforced by operation of law, . . ." (332 F. Sup. 655, at 677-78). This judgment was affirmed by the Court of Appeals for the Seventh Circuit (474 F. 2d 81 (1974)); certiorari was denied (413 U. S. 920 (1974)).

In its 1971 opinion, the District Court postulated a theme relating to remedy which recurs in and is the heart of each of its subsequent orders. It notes its undoubted authority to order a "massive fruit basket scrambling" of IPS students which it re-

3. Through 1969, Indiana session laws are printed and cited by the year adopted as a "chapter". Permanent statutes were codified as of the beginning of Indiana's 1971 legislative session as "Indiana Code, 1971". The 1971 Code, as amended through 1975, was readopted in 1976 as a restatement of Indiana law entitled "Indiana Code" and cited "IC .....". Session laws are set out in both Appendices to reflect the applicable wording in 1969 and prior years.

fused to impose because "in the long haul it won't work," as required of any remedy in *Green* v. *Board of Education of New Kent County,* 391 U. S. 430 (1968), and would cause "white flight" and resegregation.[4] The District Court, however, evinced an interest in using Uni-Gov (Acts 1969, Ch. 173; JA 154), the 1969 civil government reform in Marion County, to avoid these problems, noting that if the IPS Board's jurisdiction were coterminous with that of Uni-Gov, the resegregation problem would "pale into insignificance" and would be minimized still further if extended to Beech Grove, Speedway City located in Marion County, and parts of certain adjoining counties (332 F. Supp. at 679).

The Court then ordered the United States to add as defendants other school districts in the metropolitan area, including all the petitioners herein, for consideration of the appropriateness of the metropolitan remedy. The United States complied without, however, filing any complaint against the added school defendants. The Buckley Plaintiffs, representing a class of black students, were granted permission to intervene, joining as additional defendants several State officials and certain additional school districts, filing a complaint against all defendants challenging the constitutionality of Uni-Gov, the 1961 School Annexation statute (Acts 1961, Ch. 186, JA 138) and its 1969 amendment (Acts 1969, Ch. 52, JA 151).

In 1973, the District Court held a second hearing with all the additional parties on the issues suggested for later determination in its own 1971 order and the intervening complaint. The District Court in its opinions, however, never reached the questions of constitutionality but concentrated primarily on the questions of remedy (368 F. Supp. 1191 (1973)). It found (1) that a meaningful, permanent desegregation plan for IPS could not be accomplished within its boundaries based on evidence that

4. 332 F. Supp. at 676, 678 (1971); 368 F. Supp. at 1197, 1205 (1973), 419 F. Supp. 180, 184 (1975); 456 F. Supp. 183, 191 (1978); SA 42.

"white flight," resulting in resegregation, accelerates when any given school approaches 25%-30% black (*Id.* at 1198-99), and (2) that the State of Indiana and its officials promoted segregation *within IPS* principally by their approval of school sites and, accordingly, had an affirmative duty to desegregate IPS (*Id.* at 1202). The District Court ordered an interim intra-district plan within IPS making all elementary schools no less than 15% black (*Id.* at 1223-24) and, following the reasoning of the Court of Appeals opinion in the Sixth Circuit in *Bradley* v. *Milliken,* 484 F. 2d 215 (1973), reversed in 418 U. S. 717 (1974), ordered a broad interim remedy transferring IPS black students to surrounding school corporations in numbers necessary to increase their black enrollment to 5%, and suggested choices to the Indiana General Assembly for alternative inter-district remedies (*Id.* at 1208-09, 1228 *et seq.*).

The District Court's 1973 opinion was appealed, and on August 21, 1974, the Court of Appeals entered its decision affirming the judgment against the State for contributing to segregation *within IPS,* reversed the District Court's findings as they pertained to a metropolitan remedy beyond the "Uni-Gov boundaries" and remanded the case to the District Court for further hearing as t the remaining defendants, stating:

> The District Court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.* 503 F. 2d at 86.

A petition for certiorari with respect to this opinion was denied (421 U. S. 929 (1974)).

Summary of Subsequent Proceedings

The subsequent proceedings commenced with the 1975 remand hearing and opinion by the District Court and were based (1) on the effect of Uni-Gov, as required by the Court of Appeals mandate, and (2) for the first time on whether there

was a constitutional violation by The Housing Authority of the City of Indianapolis (HACI) in locating all its housing projects in the period prior to 1970 within the boundaries of the City of Indianapolis prior to Uni-Gov, which were substantially the IPS boundaries. The District Court found a segregative interdistrict effect for both violations but made no specific finding that the siting of public housing constituted an interdistrict school violation, nor was this issue addressed by the subsequent Court of Appeals determination.[5] The 1975 hearing and opinion culminated in a District Court judgment that each Marion County school corporation outside IPS enroll black IPS students equal to 15% of its enrollment, excepting, however, Pike and Washington,[6] whose percentages of black students had been continuously increasing, and that HACI was enjoined from locating any further housing projects within the boundaries of IPS (419 F. Supp. 180; SA 36).

This opinion was affirmed by the Court of Appeals in an opinion to which Judge Tone dissented in 541 F. 2d 1121 (1976) (SA 1). On appeals and petitions for certiorari, this Court vacated and remanded the Court of Appeals judgment for further consideration in the light of *Washington* v. *Davis,* 426 U. S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Development Corporation,* 429 U. S. 252 (1977).

Following this remand, the Court of Appeals rendered three opinions—a principal opinion by Judge Swygert in parts I and II of which Judge Fairchild concurred, and a dissenting opinion by Judge Tone (573 F. 2d 400; JA 54-83). The plurality determined that discriminatory intent, the issue on remand, could not be determined as a matter of law from the existing record and ordered the case remanded for further consideration of intent

5. In the judgments subsequent to this Court's remand in 1976, both "violations" are found to require an interdistrict school remedy.

6. Reference to the Marion County township school corporations and city or town school corporations other than IPS will be by their distinguishing name, *e.g.* "Lawrence" or "Speedway".

by the District Court (573 F. 2d 414 (1978); JA 79). The plurality portions of Judge Swygert's opinion (*e.g.*, JA 61) rely on certain findings in his pre-remand and vacated 1976 opinion, which are also relied on by the Court of Appeals majority opinion here in issue (JA 2, 7).

On the basis of the 1975 record, without hearing further evidence, the District Court then found the requisite discriminatory intent and reinstated its 1975 judgments (456 F. Supp. 183 (1978); JA 84). By a subsequent remand order, the Court of Appeals directed the District Court to hold a hearing on remedy. This hearing, held in 1978, also involved findings of fact, relevant to the question of violation, set out in an unreported opinion (JA 101 *et seq.*)[7]

By this 1979 opinion and accompanying judgment, the District Court reaffirmed its 1978 opinion, modified only to decrease the number of IPS black students transferred to Lawrence because of its rapidly increasing black enrollment, and to require certain ancillary actions by the defendants relating to such matters as "in-service" training.

On appeal, this judgment was affirmed by the Court of Appeals, by a majority opinion and order with a dissenting opinion by Judge Tone, both as yet unreported, dated April 29, 1980, to which this petition relates. An analysis of the majority Court of Appeals opinion described above depends on the pertinent facts found by the District Court and the Court of Appeals. A statement of these facts follows.

Statement of Facts

Demographics of Marion County. Marion County and the metropolitan area surrounding it is similar to many other metropolitan areas in the United States. It has a central city core with more black citizens and students than the surrounding areas which vary in black/white ratio but are predominantly

7. For a determination as to the relevance of these findings on violation, see Maj. Op. JA 17, n. 20.

white (Maj. Op., JA 6). In the school year 1968-69, 36% of IPS students were black, a percentage which has increased gradually to over 47% in the 1978-79 school year (IPS Ex. 64). The black population and students are not located in the center of Marion County or IPS, however, but in the north half of each (541 F. 2d 1215; SA 8-9). This includes Pike, Washington and Lawrence bordering IPS on the north with steadily increasing black enrollments, 19.28%, 19.01% and 9.0%, respectively, in the 1978-79 school year (D. C. Op., JA 118). Further, the total enrollment of black students in Indianapolis has decreased since 1968 by 1600 students; while the Marion County area outside has an increased enrollment of almost 4400 black students, an increase over this period of 360%, and a decrease in white enrollment of more than 1200 students. (D. C. Op., JA 109-112) Further, during this period, while the enrollment of all Marion County schools has decreased, the enrollments in the school districts surrounding Marion County continue to grow with almost entirely white students. (*Ibid.*)

History of School Boundaries. School districts are organized and operated in Indiana as corporate political entities separate from local civil government pursuant to Art. 8, § 1 of its 1851 Constitution.

After 1852, a series of statutes provided that the school boundaries would generally be coterminous with civil boundaries of towns and cities and with the unincorporated townships outside those boundaries. These statutes were, however, eroded over a number of years by statutes permitting abandonment of school cities and towns and permitting consolidation of school corporations which, once formed, operated without reference to city or town boundary changes. (Dis. Op., JA 41-43)

The continued inadequacy of this system, however, was the subject of The School Corporation Reorganization Act of 1959 (SA 63), which mandated a reorganization plan for each county

redetermining the boundaries of all school corporations and governance of each by a board of school trustees, either elected or appointed, but without *ex officio* officers. The reorganization could take the form of consolidating, subdividing or transferring territory from existing districts or any combination of these methods (SA 65).

The legislative purpose of this Act, set out in Section 1, was to provide a more effective use of public funds for school support, to modify the statutory provisions for school reorganization to assure the maintenance of a uniform and efficient public school system, and to give local electors a voice in establishing an efficient and economical plan best suited to local conditions (SA 64).

Mechanically, the reorganization plan of each county was to be established by county committee with the direction to incorporate all areas of the county into one or more school corporations with boundaries and school board structure which can "provide an adequate educational program in grades one through twelve." (SA 66.) Each county plan then required approval by a state commission and was put into effect by a petition signed by a majority of voters or by a referendum election in each corporation, except that this approval was unnecessary where there was no change in boundaries or board organization of the proposed corporation (SA 72). Because of this Act, the boundaries of 70% of the school corporations in Indiana are not coterminous with any civil government and many cross county lines (573 F. 2d 407; JA 61).

Once school corporation boundaries were determined under this action, they became fixed (541 F. 2d at 1218, SA 14). With respect to Marion County, however, a degree of flexibility was afforded reorganized school corporations by Acts 1961, Ch. 186 (JA 138). This Act provided, first, for a transfer of territory by agreement between two school corporations subject to a court remonstrance by taxpayers in the transferred territory

(JA 139),[8] and second, the right of any former city or town school corporation to annex territory unilaterally (JA 141), subject, however, to a similar remonstrance by taxpayers, and in addition, by the school corporation losing territory (JA 142-43). In each case, the remonstrance depended upon a judicial determination of whether the benefits of the proposed transfer outweighed its detriments, taking into account the interests of the schools and the pupils in both school corporations and in the territory to be transferred (JA 143). The Act, by Section 9, also permitted a third right—the boundary extension of a school corporation which had formerly been a school city or town with any annexation of territory for civil purposes by the city or town (JA 147-50). This right was, however, more limited than, and was not comparable to, the former statutes applicable in Marion County, and much of Indiana, where school boundaries automatically extended with civil annexations, and the section, because of its limitations, was consistent with the purposes of maintaining fiscal and educational efficiency for each corporation required by The Reorganization Act of 1959. Under the limits of Section 9, first, the two involved school corporations could agree not to go along with the extension of territory (JA 149). Second, the school corporation losing territory was entitled to remonstrate in court to the civil annexation in the same manner as taxpayers in the annexed territory under civil annexation statutes—a right theretofore non-existent (JA 148). Third, and more important, the grounds of remonstrance afforded the school were not limited to civil matters as in a taxpayer remonstrance—*e.g.*, whether the city is able to provide municipal services or whether the area is needed for development of the city (SA 61)—but depended on whether the benefits of the annexation outweighed the detriments, taking into consideration the interests of the residents of the civil city, each involved

8. This provision was extended to other counties by Acts 1963, Ch. 296; IC 20-4-4.

school corporation and the annexed territory (JA 148-49; Dis. Op., JA 44, n. 33).

The current school boundaries were substantially established in Marion County under The Reorganization Act by local and state hearings terminating in 1961, with the plan made effective on January 2, 1962 (541 F. 2d at 1218, SA 14). It provided for the absorption by IPS of Center Township schools, and Woodruff Place which was surrounded by IPS and operated no schools (*Ibid;* 368 F. Supp. 1203). Otherwise boundaries remained intact subject to change under the 1961 School Annexation Act described above (573 F. 2d 406, JA 61; 368 F. Supp. 1204), with each corporation governed by a school board established in accordance with the provisions of the School Reorganization Act (SA 66). During the subsequent period until 1969, there were a number of instances under the 1961 School Annexation Act in which IPS boundaries were separated from the civil boundaries (Dis. Op., JA 44, n. 33). There were, however, few civil annexations during this period, and annexation by 1970 had become impossible because of suburban taxpayer opposition (Maj. Op., JA 8; 541 F. 2d 1218, SA 14).

In 1967, before Uni-Gov was conceived, a public discussion took place among the Marion County school corporations as to the desirability of boundary change. IPS at that time adopted a resolution that further expansion was not in its interests, financially or educationally (Maj. Op., JA 10), and the Marion County school corporations, including IPS, collectively drafted and supported a bill in the 1967 General Assembly repealing Section 9 of the School Annexation Act. This bill passed both legislative houses but was vetoed by the Governor (Dis. Op., JA 39, n. 19). It was reintroduced with the same support as in the previous legislative session in 1969, passed both houses and was signed as Acts 1969, Ch. 52 (School Annexation Act Amendment). The Act became ineffective and without function with the passage of Uni-Gov.

Uni-Gov. As is evident from a map of pre-Uni-Gov Indianapolis with its "truncated" shape (573 F. 2d 403; JA 56; 368 F. Supp. 1211), described in 332 F. Supp. 635, 636, as resembling the shape of a "trussed fowl", and the substantial population in Marion County outside the boundaries of the City of Indianapolis, the City had been unable by annexation to keep pace with the area's metropolitan problems. Because annexation by the Indianapolis Civil City had become impossible, an alternative method of handling local civil government problems developed over the years with the creation of a series of independent agencies, some a part of the Indianapolis civil government with boundaries extending beyond the City limits, and others as independent, countywide government entities, each created to solve specific problems.[9] The result was a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions (541 F. 2d at 1220; SA 10). This was the problem Uni-Gov was designed to remedy, and it was accomplished by sidestepping the civil annexation problem (Maj. Op., JA 8).

The Uni-Gov Act created a new entity, a Consolidated City, into which the old city was merged (JA 157) with boundaries extending to the County line, exclusive, however, of the territories in the Towns or Cities of Speedway, Beech Grove, Lawrence and Southport (JA 154-57). This was accomplished, however, without extending Indianapolis' more costly services with their correlative taxes, such as fire, police and sewer, on the theory that, "He who gets the service pays." (JA

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9. Flood Control, IC 19-4-21-3 (1937); Health and Hospital, IC 16-12-21 (1951); Building Authority, IC 19-8-4-1 (1953); Metropolitan Plan Commission, IC 18-7-2 (1955); Park District, IC 19-7-30-2 (1919); Airport, IC 19-6-2-1 (1961); Thoroughfare, IC 19-5-4 (1963); Public Library, IC 20-13-1-10 (1947); Capital Improvements, IC 18-4-17-1 (1965); Mass Transportation, IC 19-5-2-1 (1965); Public Utilities, IC 19-3-24-3 (1929); Sanitary District, IC 19-2-14-7 (1917).

160-65) This fracturing of city service, unrelated to a public improvement, was an innovation in Indiana municipal law inapplicable to any other city or town, creating a new type of city unit by statute.

Uni-Gov then centered budget control of county and city officials and of all civil agencies except certain ones specifically exempted in a combination City-County Council (JA 155, 165-66). The budgets of the more limited fire and police service districts, however, were controlled by the representatives serving in the Council from those areas (IC-18-4-4-5). Further, the Act centralized the administration of non-judicial city and most county employees in the Mayor and in the Directors of departments set up under the Act, appointed by the Mayor with the Council's consent (IC 18-4-4-1).

Certain independent agencies, unnecessary to centralized control, were eliminated either from the budget control or from both the budgetary and administrative control (Maj. Op., JA 8; Dis. Op., JA 40, n. 20; JA 158-159). Schools were exempted (JA 159); they had never been a part of the civil government, are independent separate structures under Indiana's Constitution and statutes (sees *e.g.* I. C. 20-5-1 thru 5), were unnecessary to the purpose for which Uni-Gov was designed, and had in the recent past vigorously defended their independence (Maj. Op., JA 10; Dis. Op., JA 33-35; nn. 11-12).

Both in this case and in others, the courts have recognized that "Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County." (541 F. 2d at 1220; SA 18.) *See also, Cantwell* v. *Hudnut,* 566 F. 2d 30, 38 (7th Cir. 1977), *cert. denied,* 439 U. S. 1114 (1979) and *Bryant* v. *Whitcomb,* 419 F. Supp. 1290, 1299 (S. D. Ind. 1970).

Had the Marion County school corporations been consolidated as an additional provision of Uni-Gov, the legislation could not have been adopted (D. C. Op., JA 109).

Public Housing. It is superfluous here to set out more than the most essential facts relating to the siting of public housing as these subjects have been extensively treated in both the majority opinion (JA 11-16) and in the dissent (JA 45-51).

HACI is an independent civil city authority. In the period prior to 1969, it had jurisdiction to locate public housing projects within the boundaries of the City of Indianapolis and in an area five miles beyond these boundaries (Maj. Op., JA 13). During this period it erected ten public housing projects designed for families other than the elderly, all in the City of Indianapolis (Maj. Op., JA 13). A majority of these were located in white demographic areas (Maj. Op., JA 14), and were integrative to the extent that black families tended to locate in their vicinity (Maj. Op., JA 22). All locations were approved both by HUD and HACI.

Many of the sites for public housing were chosen by the developers as "turn key" projects—a project where the site is initially selected by the developer, the project built, and turned over as a completed project to HACI (Dis. Op., JA 45). Some of the sites were recommended by a Mayor's task force composed of members of the staff from the Metropolitan Plan Commission, the Uni-Gov predecessor to The Metropolitan Development Commission (*Ibid.*). This task force established a strategy for selecting sites for all types of multi-family dwellings in each section of the County (*Ibid.*). In fact, a substantial amount of federal subsidized housing now occupied by black residents has been located outside the original Indianapolis boundaries (D. C. Op., JA 106-10).

In the course of its duties, the task force contacted the legislative and administrative officials of Marion County, the Commissioners and County Council, who stated they could not furnish the municipal services required by cooperation agreements with the Federal government (Dis. Op., JA 49). Such an agreement is essential to Federal financing and without such an

agreement a public housing project cannot, as a financial matter, be constructed (Maj. Op., JA 15; Dis. Op., JA 47-8). Accordingly, the task force recommended no sites for public housing outside the City of Indianapolis and all ten projects were located within its pre-Uni-Gov limits. Several projects were located adjacent to Indianapolis Civil City boundaries, and in some cases these boundaries were altered by annexation so that public housing projects then built would be located in the City of Indianapolis. (Maj. Op., JA 15).

As a result of compliance with HUD regulations, black persons constituted 98% of those applying for public housing project units. Although the projects opened with a lower percent black residents, they reflect this percentage on a permanent basis. Public housing projects are subject to substantial vacancy (19.2%) (D. C. Op., JA 106) and residents moving out of the projects returned to the original Indianapolis area. There were, in the 1978-79 school year, 2,586 school age children living in these projects (*Ibid.*). There was no evidence that the location of housing projects entirely within the City of Indianapolis increased the black population located there (Dis. Op., JA 51).

Discrimination in Indiana. Indiana, as most states in the Union, had by private acts, and to a lesser extent by public acts now repealed, discriminated against black citizens (456 F. Supp. 186-7; JA 88-9).

With respect to schools: separate schools for black and white students are prohibited by Acts 1949, Ch. 186, p. 503, but prior to that time had been permitted on an optional basis under Acts 1877, Ch. 81, p. 124. There is no showing that, after 1877, separate schools were established for blacks in any of the Marion County school corporations other than IPS. Except for IPS, all Marion County school corporations have always operated unitary schools even with a substantial influx of black students (368 F. Supp. 1203).

Uni-Gov—The Majority Rationale and Its Deficiencies.

The most pertinent fact relied on by the Court of Appeals majority is that *absent some affirmative action by the Indiana Legislature* in 1969, or thereafter, IPS boundaries would not have changed. The pre-remand 1976 Court of Appeals decision notes specifically:

> The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation,

and finds, in addition, that this inability to annex was one of the reasons why Uni-Gov was adopted (541 F. 2d 1218; SA 14, n. 7).

This is even more clearly noted in the Court of Appeals 1980 decision where the majority states (JA 8):

> Civil, as well as school annexations had become all but impossible to achieve because of opposition from the suburban areas which would be affected.

Again the Court of Appeals majority finds that this condition was a necessity for Uni-Gov by "sidestepping" the problems of direct annexation (Maj. Op., JA 8). *In other words, had the Legislature done nothing, there would have been no expansion in IPS boundaries.*

But this means that the segregative impact of the 1969 Legislative Acts (Uni-Gov and the 1969 School Annexation Amendment) on which the majority depends in finding a significant interdistrict segregative effect under *Milliken* (418 U. S. at 744-45), is the failure of the Legislature to expand IPS boundaries. The Court of Appeals majority has, accordingly, created a right in each black child in a segregated central school system under the process of desegregation to have its boundaries expanded to cure the segregation occurring solely within that district.

This is explicit in the majority's pre-remand 1976 decision:

> The General Assembly, under both federal law . . . and Indiana law . . . *had an obligation to alleviate the segre-*

> *gated condition in IPS.* The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact.
>
> 541 F.2d 1211, 1220 (1976), (SA 19) (emphasis added; citations omitted)

In the first decision after remand (573 F. 2d 406-7 (1978); JA 62-65) the majority similarly found the significant interdistrict segregative effect in a failure to expand IPS, under somewhat different legal analysis but without any change in underlying premise—that the legislature had a duty to expand the boundaries of IPS:

> Under prevailing Indiana law prior to 1969, the expansion of the City of Indianapolis to the Marion County lines carried out by the Uni-Gov Act would have automatically caused the concomitant expansion of IPS. But sixteen days before final passage of the Act, the General Assembly repealed Section 9 of the 1961 Act. This repeal for the first time separated the boundaries of IPS and the City of Indianapolis. This action *had the effect of preventing the expansion of IPS boundaries.* But for the repeal of the 1961 Act, IPS would now be coextensive with Marion County and this case would have a far different cast.
>
> 573 F. 2d 401, 406 (1978); JA 63 (emphasis added)

It found further that the adoption of the 1969 School Annexation Amendment, separating school and civil annexation, not only *"had the effect of preventing the expansion of IPS boundaries"* but thereby caused "significant segregation districtwide

effects . . . *curtailing the power of IPS to remedy its own violations.*" (573 F. 2d at 407; JA 64-65).

Here again, the Court of Appeals established a duty on the Legislature to adopt an interdistrict remedy, expanding IPS boundaries, to remedy segregation occurring solely within IPS —a doctrine inconsistent with *Milliken* because that duty is not based on a constitutional violation with significant interdistrict segregative effect.

The 1980 Court of Appeals majority opinion adopts that premise and reasoning flowing from it without further discussion (Maj. Op., JA 2).[10]

In addition to premising its decisions on the duty to expand IPS boundaries, the Court of Appeals majority in both its remand decisions erroneously assumed that Section 9 of the School Annexation Act, had it not been amended, would have provided for an expansion of IPS, either by civil annexation under existing statute or by merger of the City of Indianapolis into a new type of Consolidated City under Uni-Gov with extended boundaries but without an extension of its municipal services.

Judge Swygert in his 1978 plurality opinion makes this bald conclusion without analysis, stating that Section 9 would have operated under Uni-Gov to expand IPS to the County line (573 F. 2d 407; JA 63).[11]

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10. This conclusion as set out in the pre-remand 1976 Court of Appeals majority decision was also accepted without discussion as a premise for the conclusions by the District Court in its 1978 decision (456 F. Supp. 183, 185; JA 87), a conclusion from which the District Court retreats in its 1979 opinion (D. C. Op., JA 109).

11. Even the Consolidated City excludes the Town and City of Speedway and Beech Grove in which there are school districts and the Cities of Southport and Lawrence which are part of the larger metropolitan school districts of Lawrence and Perry.

Judge Fairchild, writing for the majority in the 1980 Court of Appeals opinion states only that such an interpretation "may be appropriate" (Maj. Op., JA 9). He relies on a *definitional* section of the 1961 Annexation Act (§ 1(e), JA 138) which states that civil annexation means "any action whereby the civil boundaries of any civil city are extended." He disregards entirely, however, the provisions of Section 9 which is the only section of the 1961 School Annexation Act relating to the effects of a civil annexation on school boundaries. Under this section a school extension (in addition to the limitations set out on page 10, *supra*) "will become finally effective" solely after a final action, administrative or judicial, in a civil annexation proceeding under Acts 1905, Ch. 129, § 243, as amended (JA 149-150). An annexation under this 1905 Act can only be initiated, however, through a City Council proceeding subject to a taxpayer remonstrance (SA 57, 60).

Since Section 9 becomes operative only by complying with the provisions of the 1905 Act, annexation under this Act had become "impossible." Uni-Gov, by contrast, avoided the limitations of the 1905 Act by creating a new form of municipal government by statute, enlarged in size, totally outside and adopted to avoid the 1905 Act and its impediments. Neither the adoption of Uni-Gov nor the adoption of the 1969 school annexation amendment, repealing Section 9 (which had its historical basis in 1967 before Uni-Gov) therefore, had any impact on school boundaries except to *leave* the situation where it was before 1969 (Dis. Op., JA 39).

The dissenting opinion makes an even more detailed, analytical and penetrating analysis than this text of the absence of any effect on school boundaries, or a change in the legislative policy regarding how school boundaries are set, by the adoption of either Uni-Gov or the 1969 Amendment to the 1961 School

Annexation Statute, and necessarily reaches the same result as this text (JA 36-40, 43-45).

Discriminatory intent in the enactment of the 1969 legislation is then based in the majority opinion on (1) a purported impact which does not exist, (2) a purported change in policy in the relation between school and civil boundaries under the repeal of Section 9 by the 1969 School Annexation Amendment, which, as the dissenting opinion and this text point out, has not occurred (see pp. 19-20 *supra*), and (3) the adoption of the 1969 legislation a few months after this suit was filed and long before a finding of IPS segregation and before interdistrict relief had become either a local or national issue[12] (Maj. Op., JA 10-11).

HACI—Majority Rationale. The Court of Appeals majority finds an impact on school enrollments resulting from the siting of housing projects "by keeping black students within IPS and out of the surrounding school districts" (Maj. Op., JA 13)—a failure in substance by HACI to act with maximum interdistrict integrative effect. Findings of intent by the District Court, which the Court of Appeals found sufficient, were based,

> ". . . on the history of racial discrimination, both public and private, in housing in Marion County; *on the natural and foreseeable results of the site selection practices;* on the absence of convincing no-racial justifications for HACI's failure to locate projects outside of IPS; and on other actions by the Commission not directly related to housing,

12. The suit had been on file for only a few months and was not tried for three years. *Green* v. *Board of Education of New Kent County,* 391 U. S. 430 (1968) had just been decided, and the metropolitan cases of *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U. S. 1 (1971); *Wright* v. *City of Emporia,* 407 U. S. 451 (1972); *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189 (1972) and the interdistrict case in *Milliken* v. *Bradley,* 418 U. S. 717 (1974) had yet to be enunciated.

> which led the court to conclude that "the separation of the races, both in housing and in schools, has been an unspoken, but intentional, policy of the Commission."[13]
>
> (Maj. Op., JA 14) (emphasis added)

HACI's failure to obtain a cooperation agreement with county officials was held to be immaterial since according to the Court of Appeals majority, the evidence

> ". . . disclosed no serious attempts by HACI to obtain those agreements."

REASONS FOR ALLOWANCE OF THE WRIT

Uni-Gov and the 1969 Annexation Act Amendment.

1. The Court of Appeals majority's determination that the adoption of these Acts constituted a significant segregative interdistrict school act (Maj. Op., JA 4-5) decides important questions of federal law in conflict with the applicable decisions of this Court.

First, with respect to impact, the majority opinion is premised on the assumption that the 1969 amendment to the 1961 School Annexation Act prevented an expansion of IPS boundaries which would otherwise have occurred with the adoption of the 1969 Uni-Gov civil government reform. As set out above in the analysis of the majority opinion rationale, this is a patent misstatement of the clear language of the 1961 Act (see, pp. 19-20, *supra*). The adoption of Uni-Gov was irrelevant to the operation of the 1961 Annexation Act, amended or otherwise (Dis. Op., JA 38-40).

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13. In arriving at these conclusions, the District Court relied on *Oliver* v. *Michigan State Bd. of Education*, 508 F. 2d 178, 182 (6th Cir. 1974) in shifting the burden of proof to defendants—an incorrect doctrine as determined by this Court in *Dayton Bd. of Ed.* v. *Brinkman*, ... U. S. ....., 61 L. Ed. 2d 720, 733, n. 9 (1979). (D. C. Op., JA 94. *See*, Dis. Op., JA 35, n. 13.)

Even if the majority's assumption were correct, however, the 1969 legislation constitutes a segregative act only if the State has an obligation to correct segregation occurring in a single district, here IPS, by an interdistrict remedy. The Court of Appeals was not, however, dealing with a situation where the legislature in 1969 changed a statute under which IPS boundaries continued to expand along with those of the Civil City. Both boundaries had become substantially fixed. Nor did the Legislature adopt a statute to redraw boundaries; nor is this a situation where *de jure* interdistrict segregation resulted from a cooperative effort between IPS and the surrounding school districts.[14]

In contrast, the Indiana legislature in the course of effecting a very necessary reform of civil government did not, and could not effectively, undertake in addition to remedy the segregation occurring within a single district—IPS, by expansion of the IPS school boundaries or otherwise. The Court of Appeals, however, has affirmed and mandated an interdistrict school transfer to remedy the segregation occurring solely within a single district—an obvious conflict with *Milliken* v. *Bradley*, 418 U. S. 717, 744-747 (1974).[15]

2. Second, aside from the absence of supporting violation, the majority has failed to establish the invidious discriminatory

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14. This is not a case such as *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975) *aff'd.*, 423 U. S. 963 (1975), where the 1968 Delaware legislation in question was directed to consolidating school corporations, but excluded the City of Wilmington which was *de jure* segregated—a segregation which had been mandated by statute prior to 1954 and was a cooperative effort between Wilmington and the defendant suburbs. *See*, 393 F. Supp. at 437; 582 F. 2d 750, 763 (3rd Cir. 1978) (the subsequent proceedings on remedy), and 439 U. S. 1360, 1362-3 (Brennan, J., denying stay).

15. If the simple *failure* to expand the boundaries of a school system guilty of *de jure* segregation is a significant interdistrict segregative act under *Milliken*, then the limits placed on interdistrict relief by that opinion are illusory since the same failure is present in many major metropolitan areas throughout the country, *e.g.*, Detroit.

purpose of the legislature in its 1969 enactments as required by *Washington* v. *Davis,* 426 U. S. 229 (1977) and the principles established under *Village of Arlington Heights* v. *Metropolitan Development Corporation,* 429 U. S. 252 (1977).

The adoption of the 1969 legislation not only had no adverse racial impact on IPS boundaries, but neither the 1961 School Annexation Act, its 1969 Amendment nor Uni-Gov changed the policy for the establishment of boundaries for Marion County School Corporations consistent with the 1959 School Reorganization Act applicable to all Indiana schools (*supra,* pp. 8-11).

The only other evidences of intent are: (1) the adoption of the 1969 legislation within a few months after this case was filed at a time just after *Green* had been decided and before the trial and decision of the major large city desegregation cases or the cases involving interdistrict metropolitan relief had reached this Court (see p. 20, *supra*), and (2) the existence in the past of private and public discriminatory practices in Indiana which are common to many states in the country.[16]

These minimal showings, in the absence of impact, or a change of legislative policy "strongly favoring" a decision contrary to that reached in the course of a legitimate and exemplary reform of civil government, do not establish discriminatory intent. The opinion of the majority to the contrary is in conflict with *Washington* v. *Davis, supra, Village of Arlington Heights* v. *Metropolitan Development Corp., supra,* and *Personnel Administrator of Massachusetts* v. *Feeney,* ..... U. S. ....., 60 L. Ed. 2d 870, 888, n. 25 (1979).

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16. *Cf. City of Mobile* v. *Bolden,* ..... U. S. ....., 48 U. S. L. W. 4436, 4441 (April 22, 1980).

Siting of Public Housing Projects

1. The Court of Appeals majority determination that the siting of public housing projects inside the pre-1970 City of Indianapolis constituted a significant segregative interdistrict school violation decides an important question of federal law which has not been, but should be, clearly settled by this Court.

This Court has rendered an opinion that a Fourteenth Amendment violation by a public authority with responsibility for providing public housing cannot be remedied by a transfer of students.[17] *Armour* v. *Nix,* Civil No. 16708 (N. D. Ga., September 24, 1979) (three-judge court), *aff'd.,* 48 U. S. L. W. 3732 (No. 79-6108; May 12, 1980), holds that no such remedy is available where the involved school corporations all operate unitary school systems or are operating under court-ordered desegregation plans and where none of the plaintiffs alleged that they had been excluded from living in any particular residential area in metropolitan Atlanta (*Armour,* Slip Op., p. 32).

The application of a school remedy to a housing violation adds a new requirement to every housing law and presents unnecessarily difficult judicial problems. Adjustments to the remedy would have to occur yearly under the annual current Federal block grant and other aid systems yet to be devised. The degree of student transfer will always be uncertain;[18] housing

17. *See, Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 23 (1971).

18. The District Court in this case determined the number of students to be transferred to adjoining school corporations under the HACI "violation" should be 4958, although only 2586 students live in the housing projects, all on the theory that the 10 housing units built by HACI would be fully occupied, that the remedy should include the projected number of children who would have lived in the housing project built by the federal government in 1936 and that no students in housing projects should be transported to IPS, Washington or Pike (D. C. Op., JA 106, 117).

remedies (*e.g.* anti-redlining) are created despite their aid to residential areas populated by black citizens; and, other housing remedies are amply available to remedy a housing violation.

2. Even if a violation of a housing law also constitutes a school violation requiring the transfer of children, the Court of Appeals majority in finding the requisite racially discriminatory purpose in this case has decided an important question of federal law in conflict with applicable decisions of this Court.

The majority opinion justifies this intent "on the natural and foreseeable results of site selection practices" and "on the absence of convincing nonracial justifications for HACI's failure to locate projects outside of IPS." (Maj. Op., JA 14; *See* D. C. Op., JA 94) But HACI's inability to locate public housing projects outside the City of Indianapolis was its inability to enter into a cooperation agreement with the County Council and the County Commissioners, the governing officials in the County outside incorporated areas.[19] The question is not whether the siting was rational from HACI's standpoint but whether the County was willing to absorb the costs, including a loss of taxes, and was able to perform the services required under a cooperation agreement.[20] The task force that assisted HACI in selecting sites approached the county officials about the possibility of placing projects in their jurisdiction (541 F. 2d 1216; SA 11), but their response was negative since they could not provide the municipal services required by federal law (Dis. Op., JA 49, n. 44). Without any finding of an invidiously discriminatory intent on the part of the county officials, their failure to execute such an agreement, substantially obligating their community, is not, under *James* v. *Valtierra,* 402 U. S. 137 (1971), a Fourteenth Amendment violation. The majority

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19. The majority opinion recognizes such an agreement is a prerequisite to federal financial aid, the sole method by which a public housing project can be financed (Maj. Op., JA 15, n. 19).

20. *See,* the extensive discussion of these obligations in the dissenting opinion, JA 47, n. 38 and JA 48-49, n. 40).

opinion finds a violation in HACI's failure to make any serious attempt to obtain a cooperation agreement; but as Judge Tone said, "I assume the Housing Authority was not required by the Fourteenth Amendment to engage in a futile repetition of the request" (Dis. Op., JA 50).

CONCLUSION

The determination of the District Court and the Court of Appeals majority to order an interdistrict plan to remedy the segregation within Indianapolis has not wavered. For the reasons given, however, they have committed error justifying the granting of this petition for writ of certiorari.

Respectfully submitted,

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